

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs August 26, 2009

IN RE C.A.H. AND K.M.H.

Appeal from the Chancery Court for Wayne County
No. 11982 Stella L. Hargrove, Judge

No. M2009-00769-COA-R3-PT

The chancery court terminated Father's parental rights on the grounds of substantial noncompliance with the permanency plans and persistence of conditions. In a prior appeal, this court reversed with respect to these grounds, concluding that DCS failed to show by clear and convincing evidence that it made reasonable efforts to reunify the family in accordance with Tenn. Code Ann. § 37-1-166. We remanded for the trial court to make findings of fact and conclusions of law with respect to the third ground for termination alleged in the petition, abandonment pursuant to Tenn. Code Ann. § 36-1-102(1)(A)(iv). Upon remand, the chancery court determined that DCS clearly and convincingly established abandonment, concluding that Father's behavior constituted conduct that exhibited a wanton disregard for the welfare of the children and that termination was in the best interest of the children. Father appeals both the abandonment and best interest determinations. Finding clear and convincing evidence to support the trial court's determination, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

William J. Eledge, Lawrenceburg, Tennessee, for the appellant, A.H.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Douglas Earl Dimond, Elizabeth C. Driver, and Lindsey Owusu Appiah, Assistant Attorneys General; for the appellee, State of Tennessee.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

A.H. ("Father") is the father of two daughters, C.A.H., born in 2002, and K.M.H., born in 2003. The two girls were taken into custody by the Department of Children's Services ("DCS") in September 2005. According to the DCS petition for temporary custody, the children were living in

an unsafe environment with their parents, A.H. and A.A., both of whom allegedly used illegal drugs. The juvenile court issued a protective custody order finding C.A.H. and K.M.H. to be dependent and neglected, and they were taken into custody. Father was arrested on September 6, 2005, for the sale of methamphetamine and theft. He pled guilty to these charges in October 2005 and was sentenced to four years. After about a month in DCS custody, C.A.H. and K.M.H. were placed in the physical custody of Father's brother and sister-in-law.

DCS drafted permanency plans for both girls on September 26, 2005. Because he was incarcerated, Father did not sign these plans. The plans established goals of reunification with parent(s) or exiting custody to live with relative(s). Under the permanency plans, Father was required to (1) resolve his legal issues; (2) remain drug free; (3) obtain safe, stable housing; (4) maintain a legal source of income; and (5) address domestic violence and anger issues. The permanency plans set forth actions needed to achieve the desired outcomes. With respect to remaining drug free, Father was required to complete an alcohol and drug ("A & D") assessment, follow all recommendations, and submit to random drug screens. As part of resolving his legal issues, Father was not to obtain any new criminal charges.

Father was released from incarceration and put on probation in March 2006. In June 2006, he was arrested for criminal trespass and a parole violation and was reincarcerated for ninety (90) days.

The foster care review board met in July 2006. In its periodic review summary, the board recommended a change in the permanency goal to either adoption or exit custody to live with a relative. The projected date for goal achievement was January 2007. The board noted that neither parent had completed any tasks in the permanency plans nor had they made any progress toward reducing the risks that necessitated foster care.

At a review hearing on August 16, 2006, DCS was ordered to hold a child and family team meeting to develop a revised permanency plan. Revised permanency plans for both children were prepared on November 15, 2006. Father was no longer incarcerated and signed the revised permanency plans. The plans provided for Father to have supervised visitation with the children with the stated goal of reunification with parent(s) or exiting custody to live with relative(s).

In December 2006, Father participated in an A & D assessment on a referral from DCS. On February 8, 2007, Father was arrested on a two-count indictment for the sale of methamphetamine on September 24, 2006, and October 4, 2006. He pled guilty to these charges on April 26, 2007, and was sentenced to eight years in prison.

DCS filed a petition to terminate the parental rights of A.H. and A.A. on February 28, 2007.¹ DCS alleged three grounds for terminating Father's parental rights: (1) substantial noncompliance with the permanency plans; (2) the persistence of conditions in the home such that returning the

¹ A.A. did not appeal the termination of her parental rights.

children to Father's custody was not safe; and (3) abandonment by engaging in conduct prior to his incarceration that exhibited a wanton disregard for the children's welfare.

A hearing was held on August 30 and November 6, 2007. In a final order entered on November 26, 2007, the court terminated Father's parental rights on the grounds of substantial noncompliance with the permanency plans pursuant to Tenn. Code Ann. § 36-1-113(g)(2) and persistence of conditions pursuant to Tenn. Code Ann. § 36-1-113(g)(3).²

On appeal, this court concluded that DCS failed to show by clear and convincing evidence that it made reasonable efforts to make it possible for the children to return home in accordance with Tenn. Code Ann. § 37-1-166. This court therefore reversed with respect to the two statutory grounds upon which the trial court based its decision--substantial noncompliance with the permanency plans and persistence of conditions. We remanded for the trial court to make findings of fact and conclusions of law with respect to the third ground for termination alleged in the petition--abandonment pursuant to Tenn. Code Ann. § 36-1-102(1)(A)(iv).

On remand, the Chancery Court for Wayne County made written findings of fact in an order dated October 3, 2008. The court concluded that DCS carried its burden of proof by clear and convincing evidence as to the abandonment ground for termination. Among its findings of fact, the court noted that "[Father's] criminal history is replete with probation violations, repeated incarceration, criminal behavior and substance abuse, coupled with the failure to provide adequate support or supervision for the children." The court pointed out that because of his repeated incarcerations, Father only visited with C.A.H. and K.M.H. for a total of eight months of the children's lives. During the majority of the periods of visitation, he was using and selling methamphetamine. The court ultimately concluded that Father's "repeated behavior and substance abuse constitute conduct that exhibits a wanton disregard for the welfare of the children."

On October 15, 2008, Father filed a motion for a new trial, motion to alter or amend judgment, and/or notice of appeal. A hearing was held on February 26, 2009, in which Father and Melissa Stults, the DCS case worker assigned to C.A.H. and K.M.H., testified. The court denied Father's motion for a new trial and motion to alter or amend the judgment. In its March 16, 2009 order, the chancery court reiterated its ruling that Father had abandoned the children within the meaning of Tenn. Code Ann. § 36-1-102(1)(A)(iv) in that he was incarcerated at the time of the filing of the petition to terminate and that he had repeatedly engaged in conduct prior to incarceration that exhibited a wanton disregard for the welfare of the children. The court also made a best interest determination, finding clear and convincing evidence that termination was in the best interest of the children pursuant to Tenn. Code Ann. § 36-1-113(i).

² The court did not make any findings on the alleged ground of abandonment by wanton conduct prior to incarceration.

STANDARDS FOR TERMINATION OF PARENTAL RIGHTS

A parent has a fundamental right to the care, custody, and control of his or her child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174 (Tenn. 1996). Thus, the state may interfere with parental rights only if there is a compelling state interest. *Nash-Putnam*, 921 S.W.2d at 174-75 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)). Terminating a person's parental rights "has the legal effect of reducing the parent to the role of a complete stranger." *In re W.B., IV*, No. M2004-00999-COA-R3-PT, 2005 WL 1021618, at *6 (Tenn. Ct. App. Apr. 29, 2005). Pursuant to Tenn. Code Ann. § 36-1-113(l)(1), "[a]n order terminating parental rights shall have the effect of severing forever all legal rights and obligations of the parent or guardian of the child against whom the order of termination is entered and of the child who is the subject of the petition to that parent or guardian."

Our termination statutes identify "those situations in which the state's interest in the welfare of a child justifies interference with a parent's constitutional rights by setting forth grounds on which termination proceedings can be brought." *In re W.B.*, 2005 WL 1021618, at *7 (citing Tenn. Code Ann. § 36-1-113(g)). To support the termination of parental rights, petitioners must prove both the existence of one of the statutory grounds for termination and that termination is in the child's best interest. Tenn. Code Ann. § 36-1-113(c); *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

Because of the fundamental nature of the parent's rights and the grave consequences of the termination of those rights, courts must require a higher standard of proof in deciding termination cases. *Santosky*, 455 U.S. at 769; *Matter of M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Thus, both the grounds for termination and the best interest inquiry must be established by clear and convincing evidence. Tenn. Code Ann. § 36-1-113(c)(1); *In re Valentine*, 79 S.W.3d at 546. Clear and convincing evidence "establishes that the truth of the facts asserted is highly probable, and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *In re M.J.B.*, 140 S.W.3d 643, 653 (Tenn. Ct. App. 2004) (citations omitted). Such evidence "produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established." *Id.*

In light of the heightened standard of proof in these cases, a reviewing court must adapt the customary standard of review set forth by Tenn. R. App. P. 13(d). *Id.* at 654. As to the trial court's findings of fact, our review is de novo with a presumption of correctness unless the evidence preponderates otherwise, in accordance with Tenn. R. App. P. 13(d). *Id.* We must then determine whether the facts, as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the elements necessary to terminate parental rights. *Id.*

ANALYSIS

A party seeking the termination of parental rights must prove two elements by clear and convincing evidence: the existence of one of the statutory grounds for termination and that

termination is in the child's best interest. *In re M.L.P.*, 281 S.W.3d 387, 392 (Tenn. 2009); *In re Valentine*, 79 S.W.3d at 546; Tenn. Code Ann. § 36-1-113(c). Father appeals the trial court's determination that his parental rights should be terminated for abandonment due to wanton conduct prior to incarceration pursuant to Tenn. Code Ann. § 36-1-102(1)(A)(iv) and its determination that termination is in the children's best interest pursuant to Tenn. Code Ann. § 36-1-113(i).

Abandonment

Tenn. Code Ann. § 36-1-113(g)(1) establishes a ground for parental termination based upon abandonment as defined in Tenn. Code Ann. § 36-1-102. The petition for parental termination references the definition of abandonment set forth in Tenn. Code Ann. § 36-1-102(1)(A)(iv): "A parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child . . . and . . . the parent or guardian has engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child."

Before a trial court can terminate parental rights on certain grounds, DCS has the additional burden of proving by clear and convincing evidence that it exercised "reasonable efforts" to make it possible for the child to return home. Tenn. Code Ann. § 37-1-166(a)(2); *In re R.L.F.*, 278 S.W.3d 305, 315-16 (Tenn. Ct. App. 2008). However, DCS is absolved of the requirement of making reasonable efforts if "[t]he parent has subjected the child that is the subject of the petition . . . to aggravated circumstances as defined in § 36-1-102." Tenn. Code Ann. § 37-1-166(g)(4)(A). Abandonment is included in the definition of "aggravated circumstances" under Tenn. Code Ann. § 36-1-102(9). Thus, as we stated in the original appeal of this case, DCS had no obligation to make reasonable efforts for termination based on abandonment. *In the Matter of B.P.C.*, No. M2006-02084-COA-R3-PT, 2007 WL 1159199, at *11 n.5 (Tenn. Ct. App. Apr. 18, 2007); *State v. D.D.T.*, No. M2006-00671-COA-R3-PT, 2006 WL 2135427, at *1 (Tenn. Ct. App. July 31, 2006).

Father now argues that DCS's failure to meet its obligation to make reasonable efforts is "inextricably intertwined" with both the wanton conduct ground for abandonment, as well as the best interest determination. According to Father, DCS's failure to make reasonable efforts had a direct bearing on his pre-incarceration conduct deemed by the trial court to constitute a wanton disregard for the welfare of C.A.H. and K.M.H. Father offers no further explanation of this argument and has not presented any reason to depart from the established law of this state that termination on the basis of abandonment relieves DCS of the duty to make reasonable efforts to reunify the family.

Father also argues that his conduct prior to incarceration did not rise to the level of being wanton, as required for termination under Tenn. Code Ann. § 36-1-102(1)(A)(iv). Incarceration alone is not conclusive evidence of wanton conduct prior to incarceration. *In re Audrey S.*, 182 S.W.3d 838, 866 (Tenn. Ct. App. 2005). Rather, "incarceration serves only as a triggering mechanism that allows the court to take a closer look at the child's situation to determine whether the parental behavior that resulted in incarceration is part of a broader pattern of conduct that renders the parent unfit or poses a risk of substantial harm to the welfare of the child." *Id.* The statutory language governing abandonment due to a parent's wanton disregard for the welfare of a child

“reflects the commonsense notion that parental incarceration is a strong indicator that there may be problems in the home that threaten the welfare of the child” and recognizes that a “parent’s decision to engage in conduct that carries with it the risk of incarceration is itself indicative that the parent may not be fit to care for the child.” *Id.*

Numerous cases have held that a parent’s previous criminal conduct, coupled with a history of drug abuse, constitutes a wanton disregard for the welfare of the child. *See, e.g., State v. J.M.F.*, No. E2003-03081-COA-R3-PT, 2005 WL 94465, at *8 (Tenn. Ct. App. Jan. 11, 2005); *In re C. LaC.*, No. M2003-02164-COA-R3-PT, 2004 WL 533937, at *7 (Tenn. Ct. App. Mar. 17, 2004); *State v. Wiley*, No. 03A01-9903-JV-00091, 1999 WL 1068726, at *7 (Tenn. Ct. App. Nov. 24, 1999); *In the Matter of Shipley*, No. 03A01-9611-JV-00369, 1997 WL 596281, at *5 (Tenn. Ct. App. Sept. 29, 1997). “[P]robation violations, repeated incarceration, criminal behavior, substance abuse, and the failure to provide adequate support or supervision for a child can, alone or in combination, constitute conduct that exhibits a wanton disregard for the welfare of a child.” *In re Audrey S.*, 182 S.W.3d at 867-68.

In the present case, Father was arrested on September 6, 2005, on two counts of selling methamphetamine and theft, causing the removal of C.A.H. and K.M.H. from his home. He was released in March 2006 but violated his probation by incurring criminal trespass charges in June, resulting in further incarceration. He was released in September 2006 but was again arrested in February 2007 on two new counts of selling methamphetamine. The trial court found that when he was not incarcerated, Father was both using and selling methamphetamine during the majority of the periods of visitation with his children. Despite Father’s completion of some drug programs while incarcerated, the court specifically found Father’s assertions that he had “significantly changed” and had “turned the corner on his drug problems” to be “void of any merit.” The court also noted that “[h]is brief visitations with the children and his bonding with them pale in the face of his repeated criminal behavior and substance abuse.”

The trial court’s specific findings of fact are presumed correct unless the preponderance of the evidence is otherwise, in accordance with Tenn. R. App. P. 13(d). *In re M.J.B.*, 140 S.W.3d at 654. Under these circumstances, we conclude that Father’s behavior that resulted in incarceration is part of a broader pattern of conduct that poses a significant risk to the welfare of C.A.H. and K.M.H. We therefore conclude that the facts, as found by the trial court and supported by the preponderance of the evidence, clearly and convincingly establish that Father’s conduct constituted a wanton disregard for the welfare of his children and that the trial court properly terminated his parental rights on the ground of abandonment.

Best Interest

DCS was also required to prove by clear and convincing evidence that termination “is in the best interest of the child[ren].” Tenn. Code Ann. § 36-1-113(c)(2); *In re Valentine*, 79 S.W.3d at 546. Tenn. Code Ann. § 36-1-113(i) lists factors to be considered by the court in making its best interest determination:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Father's argument focuses on factors (2), (3), and (4) of Tenn. Code Ann. § 36-1-113(i). In particular, Father stresses that DCS has not made the "reasonable efforts" referenced in factor (2). As noted, DCS had no obligation to make reasonable efforts for termination based on abandonment. *In the Matter of B.P.C.*, 2007 WL 1159199, at *11 n.5; *State v. D.D.T.*, 2006 WL 2135427, at *1.

Ascertaining whether termination is in a child's best interest is necessarily a fact-intensive inquiry. *In re Giorgianna H.*, 205 S.W.3d 508, 523 (Tenn. Ct. App. 2006). Moreover, the best interest analysis "does not call for a rote examination of each of Tenn. Code Ann. § 36-1-113(i)'s nine factors and then a determination of whether the sum of the factors tips in favor of or against the

parent.” *In re Audrey S.*, 182 S.W.3d at 878. Rather, “[t]he relevancy and weight to be given each factor depends on the unique facts of each case.” *Id.*

The trial court conducted a best interest analysis to evaluate events that had occurred since the first termination order. In an order dated March 16, 2009, the court set forth its findings and reiterated its earlier ruling that termination was in the best interest of the children.

Father first points to the various drug and parenting programs that he has completed while incarcerated as proof of a “lasting adjustment” pursuant to factor (2). However, the trial court specifically found Father’s assertion that he had “turned the corner on his drug problems” and had “significantly changed” to be “void of any merit.” Rather, Father “has simply completed some drug programs while in the penitentiary.”

Father also criticizes DCS’s decision not to grant subsidized guardianship funds in lieu of full termination of parental rights. Melissa Stults, the case manager for C.A.H. and K.M.H., testified that Father’s request for such funding was considered on a monthly basis, but these funds are typically reserved for older, teenage children. She stated that the funds rarely affect younger children, and requests for them are usually denied. Ms. Stults testified that “the children had been in state custody for almost four years and that they need a permanent situation.”

Father also asserts that he has a bond with his children and has maintained a meaningful relationship with them. The trial court noted that Father “did visit with the children and did establish a bond with them at times when he was not incarcerated.” However, Father also lost the right of overnight visitation with his children after it was granted. Additionally, Father was “using as well as selling methamphetamine during the majority of the periods of visitation.” The court noted that C.A.H. and K.M.H. had been in foster care for nearly four years, and Father had not seen them since February 7, 2007. All told, Father visited with C.A.H. and K.M.H. “for a total of some eight months of the children’s lives.” The trial court ultimately concluded that Father’s “brief visitations with the children and his bonding with them pale in the face of his repeated criminal behavior and substance abuse.” Significantly, the trial court determined that “[t]he foster family has provided the only real consistency and stability for the children since September of 2005.”

In light of the foregoing, we agree with the trial court’s determination that the evidence clearly and convincingly establishes that termination of Father’s rights was in the best interest of C.A.H. and K.M.H.

The judgment of the trial court is affirmed. Costs of appeal are assessed against the appellant, for which execution may issue if necessary.

ANDY D. BENNETT, JUDGE